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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.394 OF 2003

Omprakash Shardaprasad Mallah & anr ... Appellants

V/s.

The State of Maharashtra ... Respondent

Mr.Yug Mohit Chaudhry for Appellants
Dr.F.R. Shaikh, APP, for Respondent

CORAM: **D.G. DESHPANDE &**
SMT.NISHITA MHATRE, JJ.

DATED: **JUNE 18, 2007**

ORAL JUDGMENT (PER SMT.MHATRE, J.):

. The Appellants herein were accused Nos.1 and 2 respectively before the Sessions Court in Sessions Case No.196 of 1998. Their trial before the Court culminated in their conviction under section 302 r/w 34 IPC. They were sentenced to suffer R.I. for life and payment of fine of Rs.1000/- each. The Appellants have impugned the judgment of the Sessions Court, Greater Bombay convicting and sentencing them.

2. The case of the prosecution is that the accused were vegetable vendors. On 28.10.1997, the victim had approached their stall when they started teasing him and an altercation took place between the accused and the victim. Accused No.1 exhorted accused No.2 to bring something which would put an end finally to their constant bickerings. Accused No.2 brought a wooden

stick (lathi) and gave a blow with it on the victim's head. Harishchandra collapsed. He was removed to Singhi hospital from where his relatives were advised to take him to Cooper hospital. On the way they stopped at Goregaon police station and then took him to Cooper hospital. On reaching Cooper hospital, it was found that the victim had already died. The Inquest panchanama was drawn up at the hospital and thereafter the police proceeded to the scene of offence. The Spot panchanama was also drawn up. The weapon of assault i.e., the wooden stick was recovered at the spot. The accused were arrested and charged for having murdered their uncle Harishchandra. They were tried by the Sessions Court, Greater Bombay and convicted and sentenced as aforesaid.

3. With the assistance of the learned Advocate for the accused and the learned APP, we have perused the record and impugned judgment. We are unable to accept the findings recorded by the learned Sessions Judge that the accused were guilty of the offence punishable under section 302 IPC r/w 34. There is no assault attributed to accused No.1. Accused No.2 has assaulted the deceased, according to the prosecution.

4. The prosecution has relied on 11 witnesses to prove its case. PW1, PW3, PW5 are eye witnesses to the incident. All of them are vegetable vendors, who have

been arrested several times by the police and against whom cases are pending in various Courts. PW1 is the uncle of the accused and a brother of Harishchandra. He claims to be an eye witness to the incident. He has spoken about accused No.2 giving a blow with a stick on the victim's head as a result of which he collapsed. PW1 claims that he was told about the altercation between his brother and his nephews by some other person. When he rushed there, he saw that Harishchandra had collapsed. On seeing his brother's condition, PW1 became unconscious. When he regained consciousness, he was informed that Harishchandra had been removed to hospital in a tempo. In his cross-examination he has admitted that he was not present when the incident occurred.

5. PW3 and PW5 had corroborated the story of PW1. They have both said that they were vegetable vendors selling their wares in the vicinity when the incident occurred. Both of them knew the deceased as well as the accused. They had heard accused No.1 urging that the accused No.2 get something which would settle their scores with the deceased. Both these witnesses claimed to have seen accused No.2 giving a blow on the victim's head. They heard a noise after which the victim collapsed and the accused ran away from the spot. Thus, the ocular evidence indicates that accused No.2 had assaulted the victim with a single blow. Accused No.1

had played no role in assaulting the victim. He had merely insisted that accused No.2 get something which would settle their differences with Harischandra.

6. The postmortem report which has been proved by PW2 indicates that there is only one injury on the victim's head. His skull was fractured. There are no other abrasions. One incised wound was noticed on the left side of the forehead above the eyebrow. The skull was found to be fractured in the left frontal area. Thus, the medical evidence corroborates the ocular testimony on record, that there was a single blow inflicted on the victim's head.

7. The wooden stick which was used for assaulting the victim was recovered from the scene of offence which is evident from the spot panchanama. PW7 was examined as a panch to the spot panchanama. However, he was declared hostile. The spot panchanama was then proved by the Investigating Officer. The recovery of the clothes of accused Nos.1 and 2 has also been proved by PW10 and PW8 respectively.

8. PW9 another panch witness was examined for proving the seizure of the clothes of the deceased. He was also declared hostile. The Investigating Officer has then proved the panchanama.

9. PW6 was the police Naik attached to Goregaon police station on the relevant date. He was patrolling the area in which the incident occurred. He intimated the police station about the incident. PW4 is the widow of Harishchandra. She has not seen the incident but was informed about the quarrel between her husband and the accused by some children in the locality. She claims that when she went to the spot she was told by PW1 about the assault on her husband. This witness has disclosed in her testimony that the victim was first taken to Singhi hospital. She accompanied the victim to Singhi hospital when they were advised to go to Cooper hospital. They stopped at the police station where her statement was recorded. Thereafter they proceeded to Cooper hospital when they were informed that her husband had already died.

10. On considering the entire evidence on record, we find that there is no role attributed to accused No.1 in assaulting the victim. The actual act of assault has been carried out by accused No.2. He dealt a single blow with a wooden stick on a victim’s head. The only role attributed to accused No.1 is that he exhorted his brother and accused No.2 to get something which would put an end to the bickerings between them and their uncle Harishchandra. Thus, as is apparent from the evidence on record, accused No.2 had dealt a single blow on the victim’ head. In view of the judgments of the

Supreme Court in the case of *State of M.P. v/s. Kal Ram*, **(2004) 12 SCC 543,** *Shivappa Buddappa Kolkar v/s. State of Karnataka,* **(2005) SCC (Cri) 93** and *Ravi Kumar v/s. State of Punjab*, **(2005) 9 SCC 315**, we find that accused No.2 had no intention to kill the deceased but knew his act would possibly result in the death of the victim. In our opinion, accused No.2 cannot be said to have committed culpable homicide amounting to murder. He committed an act punishable under section 304 Part II of the IPC.

11. As regards accused No.1, we have already found that he merely urged that accused No.2 bring something which would put an end to the bickerings between them on the one hand and the deceased on the other. It could not be said that he had a common intention to kill the deceased with accused No.2. His intention was only to at best instigate the appellant No.2 to cause hurt to the deceased. The intention was only to cause bodily pain to the deceased and not to kill him. Appellant No.2 inflicted a blow on the victim with a wooden stick without having any intention to kill him. In our opinion, therefore, accused No.1 is only guilty of having committed an offence punishable under section 324 r/w 107 of the IPC.

12. In the result, the following order is passed:

ORDER

(i) The Appeal is partly allowed.

(ii) The conviction of both the accused under section 302 r/w 34 of the IPC is set aside.

(iii) Accused No.1 is convicted for offence under section 324 r/w section 107 of the IPC and sentenced to 3 months R.I. Accused NO.1 has been in jail for almost 4 years. He be released forthwith, if not otherwise required in any other case.

(iv) Accused No.2 is convicted for the offence punishable under section 304 Part II. Accused No.2 has been in custody for about 5 years, according to his advocate. The period of sentence undergone by him is sufficient in the circumstances. He be released forthwith, if not otherwise required in any other case.

13. Appeal is disposed of accordingly.

(SMT.NISHITA MHATRE, J.) (D.G. DESHPANDE, J.)